

Before the  
**UNITED STATES COPYRIGHT ROYALTY JUDGES**  
Washington, D.C.

In the Matter of:

Determination of Royalty Rates and Terms  
for Transmission of Sound Recordings by  
Satellite Radio and “Preexisting”  
Subscription Services (SDARS III)

Docket No. 16-CRB-0001 SR/PSSR  
(2018-2022)

**SOUNDEXCHANGE’S PROPOSAL FOR THE CONDUCT OF  
PROCEEDINGS ON REMAND**

Pursuant to 37 C.F.R. § 351.15, SoundExchange, Inc. (“SoundExchange”) respectfully submits this proposal to govern the conduct and schedule of proceedings on remand from the D.C. Circuit’s decision in *Music Choice v. Copyright Royalty Board*, 970 F.3d 418 (D.C. Cir. 2020) (attached as Exhibit A hereto).<sup>1</sup> As explained below, SoundExchange proposes that Judges authorize a short period for the parties to conduct limited discovery and submit supplementary written materials addressing the issues raised in the D.C. Circuit’s opinion.

**BACKGROUND**

Music Choice appealed from the Copyright Royalty Judges’ Final Determination in *Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and “Preexisting” Subscription Services*, Docket 16-CRB-0001 SR/PSSR (the “SDARS III proceeding”). On August 18, 2020, the D.C. Circuit issued an opinion vacating two aspects of the Final Determination: (1) the Board’s (and Register’s) conclusion that Music Choice’s internet

---

<sup>1</sup> Section 351.15 states “In the event of a remand from the United States Court of Appeals for the District of Columbia Circuit of a final determination of the Copyright Royalty Judges, the parties to the proceeding shall within 45 days from the issuance of the mandate from the Court of Appeals file with the Judges written proposals for the conduct and schedule of the resolution of the remand.” The D.C. Circuit’s mandate issued on October 13, 2020. The parties’ proposals are thus due November 27, 2020.

transmissions categorically did not qualify for an “unconditional” rate set pursuant the grandfathered rate standard formerly set forth in Section 801(b)(1), and (2) the Board’s adoption of audit standards that made audits conducted on behalf of the provider of a preexisting subscription service (“PSS”) determinative only as to issues within the scope of that audit.

***Internet Transmissions.*** During the *SDARS III* proceeding, Music Choice contended that it was entitled to a rate for its internet transmissions set pursuant to the grandfathered standard formerly set forth in Section 801(b)(1) because those transmissions were part of a PSS as defined in Section 114(j)(11) of the Copyright Act. The factual basis for Music Choice’s contention was limited to a single statement in the testimony of its CEO, David Del Beccaro, that “Music Choice subscribers have had access to our audio channels through internet transmissions for almost the entire history of the company, beginning in 1996.” Del Beccaro WRT 25.

The Judges referred to the Register the novel legal question of whether Music Choice’s internet transmissions could qualify as a PSS under the Copyright Act. The Register first held as a matter of law that internet transmissions were not what she termed an “existing service offering” entitled to what the D.C. Circuit referred to as an “unconditional” PSS rate under 17 U.S.C. § 114(d)(2)(B) because the relevant statutory text and legislative history established that Congress considered PSS to be limited to services offered via cable and/or satellite, not the internet, regardless whether a PSS provider may have made some internet transmissions before July 31, 1998. 82 Fed. Reg. at 59,657-58. The Register then set forth six factors for determining whether an internet service would be what she called an “expanded service offering” entitled to what the D.C. Circuit referred to as a “conditional” PSS rate under 17 U.S.C. § 114(d)(2)(C), which applies to certain transmissions made by a PSS provider in a different transmission medium from the medium used by the service in 1998. *Id.* at 59,658-59. Those factors included “whether the service

offering is consumed in a similar manner as the 1998 service” and “whether and to what degree the service offering relates to the same pre-1998 investments that Congress sought to protect.” *Id.* at 59,658-59

With the benefit of the Register’s decision, the Judges entered their Final Determination. In the Final Determination, the Judges held, pursuant to the Register’s legal ruling, that Music Choice’s internet transmissions were not entitled to an unconditional PSS rate. The Judges further applied the Register’s six factors and concluded that Music Choice’s internet transmissions available outside the home were not entitled to a conditional PSS rate. In so holding, the Judges emphasized that Music Choice’s internet transmissions today were available outside the home and on mobile devices, and thus were substantially different from any internet transmissions Music Choice may have been making in 1998. The Judges reaffirmed that conclusion in denying Music Choice’s motion for rehearing.

On appeal, the D.C. Circuit held that the Register erred in concluding that internet transmissions were “categorically” excluded from qualifying for an unconditional PSS rate. 970 F.3d at 425-28. According to the Court of Appeals, the relevant statutory text did not preclude internet transmissions from qualifying as part of a PSS. *Id.* at 425-26. The court, however, made clear that Music Choice would be entitled to an unconditional PSS rate for its internet transmissions today *only* to the extent those transmissions fell within the “precise scope” of Music Choice’s internet service as of July 31, 1998. *Id.* at 427-28 (emphasis added). Here, the court explained exactly what the Judges were to assess on remand:

On remand, the Board must determine the precise scope of Music Choice’s service offering as it actually existed on July 31, 1998. While on the record below it is undisputed that Music Choice was making some internet transmissions at that date, there is a question about whether those transmissions were available outside the home. *See* 82 Fed. Reg. 59,660. Similarly, it has been suggested that Music

Choice's internet-exclusive channels and smartphone applications are not part of the service offering Music Choice provided on the relevant date. *See* CRB Br. 37–38. The Board must sort through these issues on remand to determine which parts of Music Choice's current service offering are eligible for the grandfathered rate because they were a part of Music Choice's service on July 31, 1998.

*Id.* In other words, if Music Choice's internet transmissions today exceed in any way the “precise scope” of their internet offerings in 1998 – including by being available outside the home or on mobile devices – they are not eligible for the unconditional grandfathered rate.

Finally, the Court noted that it was not disturbing the Register's six-factor test for determining whether internet transmissions are entitled to a conditional PSS rate. *Id.* at 427 n.9. To the extent the Judges conclude again that Music Choice is not entitled to an unconditional grandfathered rate, the Court instructed them to assess whether Music Choice would be entitled to a conditional grandfathered rate under the Register's six-factor test and other governing law. *Id.*

***Audit Provisions.*** As part of the terms adopted in the Final Determination, the Judges adopted an audit provision stating that independent audits “shall serve as an acceptable verification procedure for all parties *with respect to the information that is within the scope of the audit.*” 83 Fed. Reg. at 65,262, 65,268 (emphasis added). That provision was a change from the prior audit regime that omitted the italicized language above. 37 C.F.R. § 382.7(e) (2013). In other words, the new regulation – which tracked the audit provisions in the webcasting regulations – ensured that an audit undertaken by a party (say Music Choice) could not be used to foreclose an audit of information outside the audit's scope, and that another party (say SoundExchange) could conduct its own audit to verify information not addressed by the prior audit.

The D.C. Circuit vacated the new audit provision on the ground that the Judges had not adequately explained their decision to adopt the new audit provision after having not done so in prior proceedings. *Id.* at 428-30. The court observed that the Judges could “justify [their] change

in position” on remand by providing “a reasoned analysis” for why they adopted the new audit provision.

## **DISCUSSION**

In light of the D.C. Circuit’s opinion, SoundExchange respectfully suggests that the Judges employ the following procedure on remand.

SoundExchange proposes a limited period of additional discovery followed by written submissions in the nature of summary judgment briefing in federal court addressing the matters to be decided on remand, including the “precise scope” of Music Choice’s internet transmissions in 1998 and the extent to which Music Choice’s internet transmissions today do, or do not, qualify as part of a PSS. SoundExchange expects to establish – to the extent that it is not already clear from the record – that Music Choice’s internet transmissions today are quite different from those assertedly available in 1998, and thus that the transmissions Music Choice is currently making are not eligible for a rate set under the grandfathered standard formerly set forth in Section 801(b)(1). While the D.C. Circuit did not opine on the substance of the audit provision, and it is within the Judges’ power to re-adopt that provision with additional explanation based on the existing record, permitting the parties an opportunity to develop additional evidence may aid the Judges in evaluating the audit issue.

Specifically, SoundExchange proposes that the parties exchange document requests and up to five interrogatories pertaining to Music Choice’s internet offerings and “defensive audits” within 15 days after the Judges’ order adopting this schedule (but due to holiday office closings,

not earlier than January 6).<sup>2</sup> The parties would then have 15 days to serve responses and objections to document requests, followed by 30 days to produce documents, to serve interrogatory responses, and to identify any individuals from whom they intend to submit a declaration in connection with the briefing described below. That would be followed by a 30-day period in which each party could take up to two depositions. The parties would then have 60 days to submit simultaneous written briefing on the relevant issues and supporting material such as deposition transcripts, documents and declarations. The parties would then have 30 days to submit simultaneous reply briefs. SoundExchange does not believe that an in-person hearing should be necessary.

### CONCLUSION

SoundExchange respectfully asks that the Judges adopt the foregoing schedule to govern proceedings on remand.

Respectfully submitted,

By Steven R. Englund  
Steven R. Englund (D.C. Bar 425613)  
Matthew S. Hellman (D.C. Bar 484132)  
Emily L. Chapuis (D.C. Bar 1017600)  
JENNER & BLOCK LLP  
1099 New York Avenue NW, Suite 900  
Washington, D.C. 20001  
(t) 202-639-6000  
(f) 202-639-6066  
senglund@jenner.com  
mhellman@jenner.com  
echapuis@jenner.com

*Counsel for SoundExchange, Inc.*

Dated: November 27, 2020

---

<sup>2</sup> In the interest of mutuality, SoundExchange has contemplated the possibility that Music Choice would serve document requests on SoundExchange. However, it is not apparent that SoundExchange has any documents relevant to the questions at issue on remand.

# Proof of Delivery

I hereby certify that on Friday, November 27, 2020, I provided a true and correct copy of the SoundExchange's Proposal for the Conduct of Proceedings on Remand to the following:

Sirius XM, represented by Todd Larson, served via ESERVICE at todd.larson@weil.com

Warner Music Group, represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

Music Choice, represented by Paul M Fakler, served via ESERVICE at pfakler@orrick.com

Sony Music Entertainment, represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

American Federation of Musicians of the United States, represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

Universal Music Group, represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

American Association of Independent Music ("A2IM"), represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

SAG-AFTRA, represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

Recording Industry Association of America, represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

Signed: /s/ Steven R. Englund